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A Challenge to Workers' Rights

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Abstract

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This symposium issue of the *Nova Law Journal* on workers' rights and the new technologies has, I think, several important points of reference. First among these is the recent special issue of *democracy* dealing with technology's politics[1]—an issue which included the International Association of Machinists "Workers' Technology Bill of Rights."[2] A

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1. DEMOCRACY: A JOURNAL OF POLITICAL RENEWAL AND RADICAL CHANGE (Spring, 1983) [hereinafter cited as DEMOCRACY]. The most important essay in the issue is Noble, *Present Tense Technology* DEMOCRACY 8-24 (Spring, 1983). *See also* the author's essential introduction to the relation between American history and modern technology—which he regards as a form of "social production": D. NOBLE, AMERICA BY DESIGN: SCIENCE, TECHNOLOGY, AND THE RISE OF CORPORATE CAPITALISM (1977).

2. For proposals which parallel in important respects the IAM legislation, *see* Conyers, Jr., *Social Reform and Law Reform: Toward an Economic Bill of Rights,* 1983 DET. C. L. REV. 1121, 1125-26:

> The nature of work and production is changing dramatically as a result of computers, robotics, and the general downsizing of products of all sorts which require less and less labor input. As one example, thirty years ago several thousand telephone operators handled a million long-distance calls. Ten years later, several hundred operators accomplished the same task, and today only a dozen are needed. Technological displacement of labor in itself is nothing new. After all, from 1920 to 1980 the ranks of United States farm workers dropped from eleven to under three million. Yet, during this period, industrial expansion absorbed much of the displaced farm labor. The novel feature today is the pervasive force of new technologies which threatens to displace workers across manufacturing and service industries alike, unless counteractive labor-saving policies such as a reduced workweek are enacted. Job growth also will be curtailed by the rising tide of imports. The decision of Atari to close down its computer operation in California and to shift 1,700 jobs to Taiwan reveals the extent to which even high-tech mass production can be handled less expensively and with a comparably skilled workforce overseas. . . .
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> What is needed today is a restructuring of the relationship between the private economy and government, a closer integration between public and private decision-making, and a new social contract and economic bill of rights which protects workers, upgrades human resources, promotes full employment, safeguards the economic base of communities, and ensures

second point of reference is the series of recent law review symposium

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that federal action is responsive to the basic needs of citizens.

Along with economists, policy specialists, and community leaders, I am developing new legislation which is tentatively titled, "The Recovery and Full Employment Planning Act," and which I hope to introduce in Congress next year. Professor Bertram Gross, Emeritus Professor of Public Policy at Hunter College, who has authored every piece of full-employment legislation since the original concept in 1944, including drafts of the Humphrey-Hawkins Full Employment and Balanced Growth Act of 1978, is coordinating the project.

Ford, *Plant Closing Legislation,* 1983 DET. C.L. REV. 1219, 1219:

The economy of the United States is undergoing profound changes as it responds to rapid technological innovation and growing international competition. As one result of these changes, every state and region of the country is suffering from the effects of massive, sudden plant closings which wipe out hundreds or thousands of jobs in a single blow, leaving communities and workers unprepared for widespread unemployment and unable to make orderly adjustments. Neither the common law of the states, the National Labor Relations Act, nor any other federal statute, allows the affected workers or government any meaningful voice in business investment or disinvestment decisions that can mean financial ruin for them. Consequently, disinvestment decisions are usually undertaken without any consideration for the communities they affect.

I have introduced legislation in the House of Representatives, entitled the National Employment Priorities Act, H.R. 2847, which will grant new rights to the workers and communites affected by plant closings and provide for a more equitable sharing of the benefits and costs of economic change.

In their introduction to the IAM "Workers' Technology Bill of Rights," the editors of DEMOCRACY cite testimony before a United States House Subcommittee by IAM President William W. Winpisinger concerning the effects of the new technology on skilled labor. In a discussion on the relative merits of various American labor leaders, historian David Montgomery provides this interesting note on the head of the IAM:

These endeavors have thrust William ("Wimpy") Winpisinger into the limelight as the most highly placed champion of what might be called the respectable Left within the AFL-CIO. Under his leadership the International Association of Machinists has vigorously supported the Democratic Socialist Organizing Committee (as if the union had rediscovered its political orientation of 1911), and Winpisinger has confronted George Meany with the first consistent and principled opposition from within the executive council since the formation of the AFL-CIO. Although Winpisinger shies away from both the Old Left and the New, and has dissociated himself from Sadlowski's workplace confrontation with the bosses, and although he campaigns only for issues which are already to be found in the official program of the AFL-CIO, his prominence is important for two rea-

issues concerning conflicts which overlap with workers' rights and the new technologies: *Industrial Relations Law Journal's* forum on critical labor law theory,[3] *University of Pennsylvania Law Review's* symposium on the public/private distinction,[4] *New York University Review of Law & Social Change's* colloquium issue on the labor movement at the crossroads,[5] and *Texas Law Review's* special critique of rights issue.[6]

Finally, of course, the critical reference point is social reality itself: the emerging synthesis of law, labor, and technological transformation. This synthesis—and what it may portend for the future of American social relations—is dramatically illustrated by the recent closure of industrial manufacturing facilities which, according to their owners, are no longer competitive and cannot be rebuilt where they are while exploiting current technologies of production.[7] Commenting on the now well-known 1980 federal case of *Local 1330, United Steel Workers v. United States Steel Corporation*,[8] Jay Feinman remarks that

> [t]his case, in the words of Chief Judge Edwards of the Sixth Circuit, 'represents a cry for help from steelworkers and townspeople

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> sons. First, he calls incessantly for popular mobilizations, which both activate the labor movement and unite it with other social forces. "We need to set aside our knee-jerk reaction to other groups," he explains. Second, he bases his campaign to "fire Meany" explicitly on the premise that labor must repudiate "the economic ground rules of big business," and on the frequent declaration that he is a socialist. But the Wimpy phenomenon exists only because of the rebellion at the base, and that insurgency has also produced its indigenous forms of struggle, which are very different from national conferences or Washington lobbying.

D. MONTGOMERY, WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES 172-173 (1979).

3. *Forum* 4 IND. REL. L.J. 449 (1981).

4. *Papers from the University of Pennsylvania Law Review Symposium on The Public/Private Distinction Held at the University of Pennsylvania on January 23, 1982* 130 U. PENN. L. REV. 1289 (1982).

5. *Colloquium: The Labor Movement at the Crossroads*, 11 N.Y. UNIV. REV. OF L. & SOC. CHANGE 1 (1982-83).

6. 62 TEX L. REV. 000 (1984).

7. *See* P. DECARVALHO, PLANT CLOSINGS AND RUNAWAY INDUSTRIES: STRATEGIES FOR LABOR (1981); S. LYND, THE FIGHT AGAINST SHUTDOWNS (1982); Lynd, *What Happened in Youngstown: An Outline*, 15 RADICAL AMERICA 37-48 (No.4, 1981); *Management Prerogatives, Plant Closings, and the NLRA* 11 N.Y. UNIV. REV. OF L. & SOC. CHANGE 83-124 (1982-83).

8. *See* Local 1330, United Steel Workers v. United States Steel Corp., 492 F. Supp. 1 (N.D. Ohio 1980); Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980).

> in the City of Youngstown, Ohio who are distressed by the prospective impact upon their lives and their city by the closing of two large steel mills . . . operated (in Youngstown) by (U.S. Steel) since the turn of the century'. One of the arguments advanced was under contract law: the doctrine of promissory estoppel barred U.S. Steel from closing the plants because of representations made by company officials that the company would not close the plants if the employees' efforts rendered the plants profitable. This argument was rejected by the district court and the court of appeals because the elements of promise and reliance stated in section 90 of the *Restatement (Second) of Contracts* had not been met.[9]

The district court also rejected the steelworkers' contention that they had developed a property right in the nature of an easement[10] which should prevent United States Steel from abandoning Youngstown. Nevertheless, the court did imply that the steelworkers had presented a strong case for their having a moral right, if not a legal remedy, to keep the company in Youngstown. "This Court," asserted District Judge Lambros,

> has spent many hours searching for a way to cut to the heart of the economic reality—that obsolescence and market forces demand the close of the Mahoning Valley plants, and yet the lives of 3500 workers and their families and the supporting Youngstown community cannot be dismissed as inconsequential. United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years. Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation.[11]

The cause of the crisis facing the steelworkers, according to the court, was "obsolescence and market forces" and the basic problem was the absence, "in the code of laws of our nation," of an existing legal remedy. Could the solution to this problem, and similar ones raised by the

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9. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L.REV. 829, 858 (1983).

10. *See* Local 1330, United Steel Workers v. United States Steel Corp., 492 F. Supp. 1, 9-11 (N.D. Ohio 1980).

11. Local 1330, United Steel Workers v. United States Steel Corp., 492 F. Supp. 1, 10 (N.D. Ohio 1980), *quoted in* Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264, 1266 (6th Cir. 1980).

generation of new and innovative technologies of production, be the approach to workers' rights proposed in the IAM legislation?

The threshold issue is whether democratic social change in general, or the interests of workers in particular, can be advanced through the production and promotion of rights. Resistance to the traditional progressive notion (generated within nineteenth-century working class social movements)[12] that worker emancipation and workers' rights go hand-in-hand has developed as a tendency within the critical legal studies movement:[13] a tendency to which I refer as "postmodernism."[14] The

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12. *See* J. KUCZYNSKI, GESCHICHTE DER LAGE DER ARBEITER UNTER DEM KAPITALISMUS (40 Vols., 1960-1972); E.J. HOBSBAWM, LABOURING MEN (1964); W. ABENDROTH, A SHORT HISTORY OF THE EUROPEAN WORKING CLASS (1972); S. AND B. WEBB, INDUSTRIAL DEMOCRACY (1897); P.S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES (6 Vols., 1947-1982); H. GUTMAN, WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA: ESSAYS IN WORKING-CLASS AND SOCIAL HISTORY (1976); L. FINK, *The Uses of Political Power: Toward a Theory of the Labor Movement in the Era of the Knights of Labor*, in WORKING-CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY, AND AMERICAN SOCIETY (M. Frisch & D. Walkowitz, eds. 1983); N. SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST (1983).

13. *See* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys, ed. 1982); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship* 95 HARV. L. REV. 1669 (1982). *See also* Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L.REV. 1103, 1202 (1983) (characterizing radical utopianism through the work of critical legal scholars such as Roberto Unger, Duncan Kennedy, and Mark Tushnet):

> The utopianism of the democratic radical suggests even less defensible conclusions about rights and the institutions ultimately needed to protect them. If democratic radicalism's theory of human nature were correct, institutional structures would not play a significant role in the protection of rights. People in the community would develop shared values and, in making democratic choices, would respect any worthy rights. The democratic radical identifies aspects of individuality that a community ought to protect and longs for the day when face to face communities will internalize those aspects with such tenacity that institutional safeguards will not be necessary to protect substantively valued rights. This perspective is not confined to judicial review or fundamental rights. The democratic radical yearns for the community where shared values will replace law.

Id. Although Shiffrin effectively identifies the same tendency within critical legal studies that I will be analyzing, he confuses that tendency with the totality of democratic radicalism. Apparently Shiffrin's reading of democratic radicals fills a very short shelf. *Cf.*, Chase, *The Left On Rights: An Introduction*, 62 TEX. L.REV. 000 (1984); and, for the most important recent work on the relation between rights and democratic radicalism, *see* C. FRANQUI, FAMILY PORTRAIT WITH FIDEL (1984). *See also* Bobbio, *Are There Alternatives to Representative Democracy*? 35 TELOS 17 (Spring, 1978); Cas-

postmodernist analysis of rights is a response to what Joel Whitebook

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toriadis, *Socialism and Autonomous Society*, 43 TELOS 91 (Spring, 1980); Cohen, *Beyond Reform or Revolution? The Problem of French Socialism*, 55 TELOS 5 (Spring, 1983).

14. *See* H. Foster, *Postmodernism: A Preface* in THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE ix (H. Foster, ed. 1983):

> Postmodernism: does it exist at all and, if so, what does it mean?. . .Craig Owens and Kenneth Frampton frame its rise in the fall of modern myths of progress and mastery. But all the critics, save Jurgen Habermas, hold this belief in common: that the project of modernity is now deeply problematic. . .In short, modernism, as even Habermas writes, seems 'dominant but dead.

Id. It is relatively easy (and appropriate) to assimilate to what Foster (and many other cultural critics) call "postmodernism" that radical utopian tendency within critical legal studies (identified above by Shiffrin) which sometimes designates itself as "Irrationalist"; *see Debates About Theory Within Critical Legal Studies*, LIZARD 3, 4 (Jan. 5, 1984) (on file at the Nova Law Journal):

> The irrationalist wants to unfreeze the social structure of meaning, to free up the possibilities for new ways to think and act in the world. In this view, law is merely an instance of social mythologizing. And it's not that there is some way of 'reasoning' that is immune to the critique; there is no 'true' analysis that comports with the way things really are, because there is no hard social reality separate from our social construction of meaning.

Id. "Postmodernism" is a better label than "Irrationalism" since hostility to reason (and thus the Enlightenment), as well as a natural receptivity toward the work of Michel Foucault, constitute but one representative aspect of the ensemble of values and intuitions presented to society by the critical legal studies postmodernist tendency. Outright opposition to structure and organization, "scientific Marxism," economism, instrumentalism, what Robert Gordon would call "large-scale theories of historical interrelations between states, societies, and economies," and, special antipathy toward individualism and rights, rounds out the general image of postmodernist attitudes within critical legal theory; *see* R. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys, ed. 1982); Boyle, *Opposition, Splits, and Tensions*, 8th NATIONAL CONFERENCE ON CRITICAL LEGAL STUDIES: INFORMATION PACKET & READINGS 35-38 (March 16-18, 1984) (on file at the Nova Law Journal).

While critical of hierarchical social relations and the alienation which they produce, the postmodernists would probably agree with Fred Dallmayr that ". . .the malaise of modern and contemporary life can be traced, either directly or indirectly, to its anthropocentric and subjectivist thrust or its focus on the thinking subject; according to some the malaise has already reached a crisis stage with the result that the 'end' or 'death of man' is imminent (if not an accomplished fact). Spokesmen differ as to the nature of proposed antidotes or substitutes for modern subjectivity and individualism; but a preferred (though not uniformly endorsed) remedy consists in a radical shift of attention, aimed at dislocating or 'decentering' man in favor of overarching structures or systemic relationships." F. DALLMAYR, TWILIGHT OF SUBJECTIVITY: CONTRIBU-

calls the "crisis of modernity":

> Three different responses to the crisis of modernity can be distinguished. The first two, anti-humanism and the counter-enlightenment, are alike in so far as both maintain that modernity is irredeemably *aporetic*; the crisis of modernity cannot be resolved from within, but requires a holistic transformation of the modern project. The positions differ with respect to the alternative directions they advocate. The third position, of which Habermas is the primary exponent, maintains that the crisis can only be resolved by completing, rather than abandoning, the modern project. As he asks, "should we try to hold on to the *intentions* of the Enlightenment, feeble as they may be, or should we declare the entire project of modernity a lost cause?" The modern project is not *aporetic,* but only at odds with itself. The crisis of modernity, as he sees it, results from the absolutization of instrumental reason and the concomitant suppression of practical reason. He therefore seeks to rehabilitate the Enlightenment's tradition of practical reason and assert it against its tradition of instrumental reason in order to correct that imbalance. It is thus with respect to practical reason that he wants to "hold on to the *intentions* of the Enlightenment."[15]

TIONS TO A POST-INDIVIDUALIST THEORY OF POLITICS 11 (1981). Dallmayr thus helps to explain the postmodernist appreciation of Foucault and Derrida as well as the parallel commitment to application of structural and deconstructionist techniques within the study of American law; *see* E. KURZWEIL, THE AGE OF STRUCTURALISM: LEVI-STRAUSS TO FOUCAULT (1980); M. FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS, 1972-1977 (C. Gordon, ed. 1980); J. DERRIDA, WRITING AND DIFFERENCE (A. Bass, trans. 1978); M. RYAN, MARXISM AND DECONSTRUCTION: A CRITICAL ARTICULATION (1982); C. NORRIS, DECONSTRUCTION: THEORY AND PRACTICE (1982); P. BURGER, THEORY OF THE AVANT-GARDE (M. Shaw, trans. 1984); C. NORRIS, THE DECONSTRUCTIVE TURN: ESSAYS IN THE RHETORIC OF PHILOSOPHY (1983).

The relation between modernism and postmodernism both inside and outside critical legal theory is fascinating and complicated. *See* MODERNISM, 1890-1930 (M. Bradbury & J. McFarlane, eds. 1976); THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE (H. Foster, ed. 1983); M. BERMAN, ALL THAT IS SOLID MELTS INTO AIR (1982); J. LEARS, NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920 (1981); Rajchman, *Foucault, or the Ends of Modernism*, 24 OCTOBER 37 (Spring, 1983); E. BRUSS, BEAUTIFUL THEORIES: THE SPECTACLE OF DISCOURSE IN CONTEMPORARY CRITICISM (1982); J. BURNHAM, THE STRUCTURE OF ART (1973); S. GABLIK, PROGRESS IN ART (1976).

15. Whitebook, *Saving the Subject: Modernity and the Problem of the Autonomous Individual*, 50 TELOS 79 (Winter, 1981-82).

Rights in general, and rights for workers in particular, constitute part of the achievement which Habermas conceives having an essential role to play in the resurrection of "practical reason" and the elaboration of an authentic socialist democracy.[16] If it is Habermas' intention to complete, rather than abandon, the Enlightenment, it remains nevertheless the purpose of the counter-enlightenment—here the postmodernists within critical legal studies—to secure a "holistic transformation of the modern project."[17] And that means, first of all, a systematic interrogation of the ideology of rights. Peter Gabel and Paul Harris, for example, argue that

> [t]he point is not simply that rights-consciousness inherently implies the necessity of social antagonism (since rights are normally asserted against others). It is rather that this very way of thinking about people involves a bizarre abstracting away from one's true experience of others as here with us existing in the world. An alternative approach to politics based on resolving differences through compassion and empathy would presuppose that people can engage in political discussion and action that is founded upon a felt recognition of one another as human beings, instead of conceiving of the political realm as a context where one abstract 'legal subject' confronts another. A genuinely socialist politics would presumably be based on such a view of group life, but many lawyers on the left insist that the use of rights-rhetoric remains necessary for effective political organizing today.[18]

To conceive of social progress in terms of rights enhancement, according to Gabel and Harris, is to poison the whole project in advance by embedding the vision of a better world within a politics whose central categories, by definition, reproduce the alienation of the individual from the community and of men and women from themselves. This general postmodernist rights analysis has so far only found one location of concrete application: labor law. Karl Klare, for example, argues that whatever social improvements may have been gained through the establishment and then extension of workers' rights, have been undercut by the capacity of labor law ideology to "legitimate and justify unnec-

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16. *See* Chase, *supra* note 13.

17. *See* Whitebook, *supra* note 15.

18. Gabel and Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law,* 11 N.Y. UNIV. REV. OF LAW & SOC. CHANGE 369, 376 n.13 (1982-83).

essary and destructive hierarchy and domination in the workplace."[19] Without intending to demean "the heroism of American workers,"[20] Klare argues that post-New Deal labor law has induced "organized workers to consent to and participate in their own domination"[21] and indicates that "liberal collective bargaining law is itself a form of political domination."[22] Referring to the "legislative analogy" (collective bargaining is disguised as a kind of legally neutral and politically equitable process),[23] Klare suggests that the ideology of labor law has helped workers to actually buy the notion that the system is democratic and encourages "worker acceptance of the supposedly 'inevitable and eternal separation of industrial men into managers and the managed.' "[24]

Agreeing with Klare's critique of rights as cooptation and with his analysis of the ideological power of labor law, premier postmodernist Duncan Kennedy[25] regards post-World War II labor law "as a mechanism that coopts the working class and defuses class struggle."[26] How does this "demobilizing ideology"[27] bring class struggle to a standstill? "The justifications offered for the rules" of labor law, asserts Kennedy, "disguise their repressive function in the language of industrial peace or workplace democracy."[28] Apparently deceived by such ideological manipulation, the ideology of labor law causes workers to abandon their initial militancy and, worse, ". . .the working class itself, directly and through its intelligentsia, has been deeply implicated in the development of the rules and the elaboration of the justificatory ideology."[29]

There are two initial observations which should be made regarding the Gabel and Harris, Klare, and Kennedy ideology of rights thesis as applied within the labor law context. First, the critical labor jurispru-

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19. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 IND. REL L. J. 450, 452 (1981).

20. *Id.* at 481-482.

21. *Id.* at 455.

22. *Id.* at 452.

23. *Id.* at 458-59.

24. *Id.* at 459.

25. *See* Kennedy, *The Structure of Blackstone's Commentaries* 8 BUFFALO L. REV. 205 (1979).

26. Kennedy, *Critical Labor Law Theory: A Comment*, 4 IND. REL. L. J. 503, 503 (1981).

27. *Id.* at 504.

28. *Id.*

29. *Id.*

dence seems to be quite uncharacteristically *instrumentalist* in nature. Labor law is pictured somewhat one-dimensionally, primarily through its deployment as an ideological instrument for more or less hammering the workers into shape. These critical legal theorists have generally been in the vanguard of *opposition* to the notion that law performs merely instrumental functions within society.[30] It would appear that an *absolute* hostility toward instrumental interpretations of law and society does not represent a defining characteristic of postmodernism within critical legal studies.[31]

Second, the critical labor jurisprudence is concerned with labor law primarily in order to help explain the general paralysis, as these postmodernist theorists see it, of the American labor movement. The political choices made by American workers over the last half-century, however, may not have been in any significant way the result of labor law ideology—at least according to some of America's most interesting labor historians. The portrait of American labor history projected onto the social canvas by the critical legal scholars is rather different from the one drawn by the labor historians.[32]

Explaining the development of American trade unionism, the labor historians tend to emphasize (1) "the two-party system" of American politics where neither party was a labor party;[33] (2) "the universally held belief in the major tenet of private property";[34] (3) "the continued division of the American working class into separate ideological, ethnic,

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30. *See, e.g.*, Gabel and Harris, *supra* note 18, at 369 n.1; Klare, *Law-Making as Praxis*, 40 Telos 123, 128-133 (Summer, 1979); Kennedy, *Legal Education as Training for Hierarchy*, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40, 46-50 (D. Kairys, ed. 1982).

31. *See supra* note 14.

32. *See, e.g.*, D. MONTGOMERY, *supra n.2;* D. MILTON, THE POLITICS OF U.S. LABOR: FROM THE GREAT DEPRESSION TO THE NEW DEAL (1982); F. FOX PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1977); D. BRODY, WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE (1980); R. KEERAN, THE COMMUNIST PARTY AND THE AUTO WORKERS UNIONS (1980); A. MEIER & E. RUDWICK, BLACK DETROIT AND THE RISE OF THE UAW (1979); P. FRIEDLANDER, THE EMERGENCE OF A UAW LOCAL, 1936-1939: A STUDY IN CLASS AND CULTURE (1975); WORKERS' STRUGGLES, PAST AND PRESENT: A "RADICAL AMERICA" READER (J. Green ed. 1983); B. COCHRAN, LABOR AND COMMUNISM: THE CONFLICT THAT SHAPED AMERICAN UNIONS (1977); WORKING-CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY, AND AMERICAN SOCIETY (M. Frisch & D. Walkowitz, eds. 1983).

33. D. MILTON, *supra* note 32, at 106.

34. *Id.*

and religious groupings";[35] (4) "the ideology of nationalism" where "nationalism historically has had a long record of success in subduing ideologies based on class struggle";[36] (5) the willingness of most American Communists to subordinate the interests of American workers to the foreign policy of the Soviet Union which led to a separate peace with Roosevelt and business unionism during World War II;[37] (6) the anti-Communist inquisition in post-World War II America which decimated the leadership ranks of radical labor as well as the rest of American social and cultural life, irrespective of actual political party affiliation;[38] (7) the material, rather than ideological, consequences of labor laws such as the Taft-Hartley Act (1947) which "emasculated the Wagner Act" and "banned mass picketing, secondary boycotts, and sympathy strikes, all associated with the tactics of the social movement

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35. *Id.*

36. *Id.* at 113.

37. *Id.* at 135-138. *But cf.* R. KEERAN, *supra* note 32, at 226:

> During the 30 years since World War II, a conventional view of the wartime experience of Communists in the auto industry has developed largely through the work of such labor historians as Joel Seidman, Irving Howe, B.J. Widick, Art Preis, and most recently Bert Cochran, all of whom have written from a Trotskyist or Social-Democratic perspective. The conventional view holds that the left-wing caucus in the UAW, the caucus of the Communists and Secretary-Treasurer George Addes, lost influence during the war because the Communists and their allies sacrificed the immediate interests of the workers for the cause of victory over fascism. In this view the Communists made themselves unpopular by their ardent advocacy of incentive pay and the no-strike pledge. The conventional view also holds that the main reason the Communists were so willing to sacrifice the immediate interests of workers was because the 'prime allegiance' of the Communists was not to the workers but to the 'needs of the U.S.S.R.' Consequently, the right-wing caucus led by Walter Reuther, who opposed incentive pay and vacillated on the no-strike pledge, gained sufficient influence during the war to elect Reuther president of the UAW at the union's first postwar convention in 1946. The conventional view simplifies a complex and contradictory history in two major respects. . . .

Anyone wishing to write about the "complex and contradictory history" of the American labor movement during the past half-century (including the critical legal scholars) might well adopt Keeran's rigorous methodology.

38. *See* R. KEERAN, *supra* note 32; D. MILTON, *supra* note 32; B. COCHRAN, *supra* note 32. *See also* D. CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); S. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR (1982); A. KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER (1983); M. ROGIN, THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER (1967).

of industrial unionism identified with the CIO;"[39] (8) a labor leadership crisis where "the vast majority of labor leaders accepted the system of corporate state capitalism"[40] and where "orientation of the unions toward management was facilitated by the severing of union leadership from dependence on the rank and file, first through their reliance on the federal government for membership gains, and then through the dues check-off";[41] (9) "dependence of the unions for their organizational ability on the well-being of the industry"[42] accompanied by "a widespread erosion . . . in union membership and power";[43] (10) that to "think only in terms of work relations . . . and union bureaucrats is to ignore the centerpiece of the game: the awesome power which a company wields over its employees."[44]

A methodological distinction between the critical labor theory's explanation of American worker "demobilization" and that carefully riveted to the social experience of the American working class by the labor historians is that the legal scholars seem to ignore history—or at least the historians—altogether.[45] None of the contributing factors to

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39. D. MILTON, *supra* note 32, at 159; *See also* D. MONTGOMERY, *supra* note 32, at 166-167; F. FOX PIVEN & R. CLOWARD, *supra* note 32, at 168-170; W.A. WILLIAMS, AMERICANS IN A CHANGING WORLD 391-392 (1978).

40. W.A. WILLIAMS, *supra* note 39, at 391.

41. F. FOX PIVEN & R. CLOWARD, *supra* note 32, at 160.

42. *Id.* at 159.

43. A.H. Raskin, noted labor journalist, quoted in D. BRODY, *supra* note 32, at 254-255.

44. D. MONTGOMERY, *supra* note 2, at 156.

45. Given their confidence that American workers are familiar with and coopted by the ideology of labor law, it is unfortunate that Klare and Kennedy ignore the writing of such workers-turned-historians as Stan Weir of San Pedro, California; *see supra text*; *see also* Weir, *Conflict in American Unions and the Resistance to Alternative Ideas from the Rank and File,* in J. Green, ed. *supra* note 32, at 251, 256-257 :

> As soon as the employers accept collective bargaining as a fact of life and their signatures are put on contracts that they do not intend to break in other than a piecemeal way, the top labor leadership particularly must undergo a full change in attitude. For a time they may remain bitterly angry at some or all of the employers or their representatives, *but they must now show concern about the employers' competitive position.* . . .The open and total conflict relationship of the precontract days has to go. . .The ranks, however, do not share the change in attitude of their leaders. They too want to retain and maintain the contracts, but they see no reason for pulling back from a struggle to win a grievance that is legitimate. Their method for fighting a grievance is one of continued battle until won or lost. For moments at a time in the meetings down at the union hall it is possible

the shaping of the American labor movement mentioned above or the hisorical work from which the list is drawn are explored in the postmodernist critique of workers' rights and where they have led. Why should that be so?

I believe that the methodology deployed by the critical labor theo-

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> for them to see the logic of their leaders on the necessity to keep the company in business. *That reason is destroyed the moment they physically or mentally return to work.* The attitude of the company toward them is one of total antagonism and disrespect whenever the production process is in motion. Schizophrenia cannot live in a reality where there is so much immediate pain and unhappiness. (latter emphasis added).

See also comments made by Robert Gordon in an "unpublished summary of a first draft" at the 1979 national conference on critical legal studies in Madison, Wisconsin (on file at Nova Law Journal):

> [I]t is perfectly reasonable to respond (as, for example, Duncan Kennedy and J.G.A. Pocock both do) that there is much basic work still to do in simply describing basic structures of thought and their transformations; and that such work is prerequisite to connecting the structures to the material world. But one can't help feeling that under this program the task of connection *(especially given the fondness of law trained people for doctrine)* is likely to be indefinitely postponed and that in the meantime tendentious connections *(like those of the instrumental schools)* will continue to be assumed. *Id.* (emphases added).

See also comments by intellectual historian Felix Gilbert in Gilbert, *Intellectual History: Its Aims and Methods*,100 DAEDALUS 80, 94 (Winter, 1971):

> Intellectual history cannot claim to be the true or only history; modern intellectual history arose after belief in the control of events by ideas had collapsed. It exists only in connection with, and in relation to, the surrounding political, economic, and social forces. The investigation of subjects of intellectual history leads beyond the purely intellectual world and *intellectual history per se does not exist.*

Id. (emphasis added).*But see contra* Klare, *supra* note 19, at 452 n.6: "It must be acknowledged that an important limitation of the critical labor law approach is its relative neglect, thus far, of the important task of drawing out empirically the interrelationships and connections between the *intellectual history* of collective bargaining law and the social history of the post-World War II labor movement." *Id.* (emphasis added).

Finally, it is instructive to observe the contradictory relation between Duncan Kennedy's sophisticated and enormously compelling portrait of the forces shaping American law student (and legal professional) consciousness with his critique of organized labor consciousness; *See* D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983). The equivalent of Kennedy's analysis of labor law ideology within the law school context would be the assertion that law students are politically demobilized primarily by the ideology of student honor codes. Avoiding such errant reductionism within the law school context, Kennedy drives home a critique literally unmatched anywhere by anybody.

rists has *not* been to systematically study the history of American labor—then labor law—and come to the conclusion that the importance of labor law ideology in "demobilizing" the working class has been insufficiently emphasized by other labor scholars. On the contrary, the purpose of the critical labor jurisprudence seems to be the advancement of the postmodernist critique of law generally and rights in particular—rather than an elaboration of the historical structure of material as well as ideological forces shaping the American labor movement. Thus the disinterest in existing American labor historical research becomes easier to understand.

This does not mean, of course, that the postmodernists within critical legal studies are without some fascinating insights. As long as "us" is understood to mean no one in particular, it is appropriate to argue that the critical labor jurisprudence shows how "[b]y inducing us to believe that existing institutions and patterns of social thought are natural, rational, or necessary, legal discourse inhibits our ability to perceive the contingency of present arrangements—the extent to which they are created and sustained by human choice."[46] But this general theoretical achievement is not the same thing as a demonstration that identifiable members of the organized working class see themselves and their struggles primarily through the optic of labor law ideology. None of the postmodernist critique of law has yet proved that workers should

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46. Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 475, 475-476 (1983). At one point, the author suggests that "[a]s we invent ever more sophisticated stories to delimit the spheres of state power and individual freedom, we *(judges, lawyers, scholars, student note-writers)* reproduce a social meaning system that obscures and denies the complex, dense textures of social life." *Id.* at 493 (emphasis added). Entirely without fanfare, Klare's and Kennedy's "demobilized" working class has become an ideologically mesmerized ensemble of lawyers and law professors. It would appear that the victims of labor law ideology according to the latest version of the critical labor jurisprudence no longer include longshoremen like Stan Weir or the rest of the American working class either (unless labor law judges are now seen as a kind of "new working class"). Unless the postmodernists are prepared to develop a social theory of the intelligentsia, they should return to the "workers as victims" version and (as Klare indicates) start talking about American "social history." *See* M. Meisner, *The Defection of the Intellectuals* in MAO'S CHINA: A HISTORY OF THE PEOPLE'S REPUBLIC (1977); M. MEISNER, LI TA-CHAO AND THE ORIGINS OF CHINESE MARXISM (1967); G. KONRAD AND I. SZELENYI, THE INTELLECTUALS ON THE ROAD TO CLASS POWER: A SOCIOLOGICAL STUDY OF THE ROLE OF THE INTELLIGENTSIA IN SOCIALISM (1979); A. GOULDNER, THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS (1979).

not pursue a systematic expansion of their legal rights—or why Americans should not press for adoption of the IAM bill of workers' rights.[47]

47. Really damaging opposition to workers' rights comes, of course, not from postmodernism within critical legal studies but from *capital* in the social world. *See* M. GIBSON, WORKERS' RIGHTS (1983); P. SIMON, REAGAN IN THE WORKPLACE: UNRAVELING THE HEALTH AND SAFETY NET (1983); *Reagan's NLRB: Crisis in Labor Law*, 7 GUILD NOTES 3 (Nov.-Dec. 1983); Aronowitz, *Two, Three, Many Greyhounds?*, NATION 624 (Dec. 17, 1983); Mann, *Workers and Community Take on G.M.*, NATION 145 (Feb. 11, 1984); Schmiechen, et. al., *Waking from the American Dream*, NATION 241 (March 3, 1984); Egan & Noble, *The Lab Worker's Lonely Victory*, NATION 350 (March 24, 1984); Early, *A New Generation of Labor Leftists*, NATION 542 (May 5, 1984).